

In the Matter of)	
)	
THE TENNIS CHANNEL, INC.,)	MB Docket No. 10-204
Complainant,)	File No. CSR-8258-P
)	
v.)	
)	
COMCAST CABLE COMMUNICATIONS, LLC,)	
Defendant.)	
)	

**TENNIS CHANNEL'S MOTION TO STRIKE
PORTIONS OF WRITTEN DIRECT TESTIMONY OF GREG RIGDON**

Tennis Channel seeks an order striking from the record testimony by Greg Rigdon, Comcast's Executive Vice President of Content Acquisition, relating to the decisions made by his former employer, Charter Communications, regarding carriage of Tennis Channel. Because of Comcast's delayed disclosure of its intent to call Mr. Rigdon to testify on this subject, Tennis Channel has been unable to obtain complete discovery relevant to the subject and is therefore prejudiced in its ability to cross examine Mr. Rigdon.

Under the order entered by the Presiding Judge on December 9, 2010, document production was scheduled to end on January 28, 2011. Depositions were scheduled to end on March 11, 2011. It was not until February 22, however, that Comcast disclosed its intent to add Mr. Rigdon as a potential trial witness. And Comcast did not disclose the areas on which it anticipated Mr. Rigdon would testify until March 9. On that date — a mere two days before his scheduled deposition — Comcast for the first time indicated that it expected to elicit testimony

regarding Mr. Rigdon's experience with Tennis Channel from his time at Charter. Mr. Rigdon was deposed on March 11.

Tennis Channel does not object to those portions of Mr. Rigdon's testimony that relate to his tenure at Comcast. Tennis Channel does, however, object to those portions — paragraphs 8, 9, and 10 of Mr. Rigdon's testimony — that discuss and purport to characterize Charter's evaluation of Tennis Channel. Documents from Charter's files would be highly relevant to this testimony, but those documents are unavailable to Tennis Channel because Comcast's late identification of Mr. Rigdon as a witness on this subject, long after document production was scheduled to be completed, made it impossible to subpoena them. Because Comcast asserted that it expected to elicit testimony on this subject only two days before Mr. Rigdon's deposition, Tennis Channel was not in a position to subpoena the relevant documents from Charter or to ask Mr. Rigdon about such documents during his deposition. Indeed, under the Scheduling Order in this proceeding, deposition discovery closed on March 11, subject to two depositions that the parties had previously agreed could occur after the deadline because of the schedules of the witnesses.

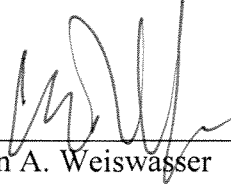
The inadequate documentary and deposition record puts Tennis Channel at a serious disadvantage. It is a basic principle that “[i]f a party fails to provide information or identify a witness as required . . . , the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.” Fed. R. Civ. P. 37(c)(1). Under this rule, “the sanction of exclusion of a witness is ‘automatic and mandatory unless the party to be sanctioned can show that its violation . . . was either [substantially] justified or harmless.’” *Elion v. Jackson*, 544 F.Supp.2d

1, 6 (D.D.C. 2008) (quoting *NutraSweet Co. v. X-L Engineering Co.*, 227 F.3d 776, 785-86 (7th Cir. 2000)).

Here, Comcast's failure to promptly disclose the subjects on which it planned to examine Mr. Rigdon is not justified; it could have done so at least as early as February 22, when it identified him as a potential trial witness. By that date, Comcast had already provided declarations and expert reports from its other witnesses, and it must have known or could easily have decided on the subjects on which it thought Mr. Rigdon might testify. And Comcast's failure to promptly disclose that it planned to elicit testimony from Mr. Rigdon regarding Charter's putative thinking on Tennis Channel is not harmless: It "prevented [Tennis Channel] from preparing to meet [Mr. Rigdon's] testimony." *Id.* ("The harm from the failure to disclose a witness flows from the unfair surprise hindering the prejudiced party's ability to examine and contest that witness' evidence.") (quoting *United States ex rel. Purcell v. MWI Corp.*, 520 F.Supp.2d 158, 168 (D.D.C. 2007)) (internal quotation marks omitted).

Comcast should not be permitted to offer one-sided testimony on the subject of third-party distributors' views — Comcast's *only* proffered fact testimony on this subject in the entire case — from a witness whose documents, and whose response to documents, have been unavailable for all practical purposes to Tennis Channel because of Comcast's delinquent disclosure of its plans.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'SAW', is positioned above a horizontal line.

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April 26, 2011

CERTIFICATE OF SERVICE

I, Leah E. Pogoriler, hereby certify that on this 26th day of April, 2011, I caused a true and correct copy of the foregoing Motion to Strike to be served by electronic mail upon:

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